

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE**

IN RE: BRIMONIDINE PATENT  
LITIGATION

MDL Docket No. 07-md-1866 (GMS)

**DEFENDANTS' JOINT REQUEST FOR RELIEF FROM THE  
REQUIREMENT OF APPOINTMENT OF LEAD AND LIAISON COUNSEL**

While there are currently six Defendants in this multidistrict proceeding, the Defendants easily separate into two groups. The first group includes Apotex Corporation and Apotex, Inc. (collectively "Apotex"), both of which are represented by the same counsel; and the second group includes Exela PharmSci, Inc., Exela Pharm Sci, Ltd., Paddock Laboratories, Inc., and PharmaForce, Inc. (collectively "Exela"), all of whom are represented by the same counsel. There is one plaintiff, Allergan, Inc.

The Defendants respectfully make this submission in response to the Court's November 15, 2007 Order Setting Scheduling Conference (the "Order") requesting that interested counsel file applications for lead and liaison counsel appointments. The Defendants have conferred and, taking into account the criteria enumerated in the Order for such appointments and the circumstances surrounding this particular litigation, respectfully submit that this case is not a typical MDL action with many parties that would necessitate a lead and liaison counsel requirement. Instead, this case concerns three parties, Allergan and the two Defendants, Apotex

and Exela. Therefore, the Defendants respectfully ask the Court to not appoint lead and liaison counsel, particularly as those terms are defined in the *Manual for Complex Litigation*.<sup>1</sup>

In the alternative, if the Court finds it necessary to appoint lead and liaison counsel, each Defendant would request its individual counsel be appointed as joint-lead and joint-liaison counsel.

# **I. This Proceeding Does Not Warrant the Appointment of Lead and Liaison Counsel**

This is a patent infringement case under the Hatch-Waxman Act involving U.S. Patent Nos. 5,424,078 (“the ’078 patent”), 6,562,873 (“the ’873 patent”), 6,627,210 (“the ’210 patent”), 6,673,337 (“the ’337 patent”), and 6,641,834 (“the ’834 patent”) (collectively “the patents-in-suit”). Allergan has asserted all five patents-in-suit against Apotex and Exela.

This proceeding involves the consolidation of only two cases. It is respectfully suggested that such a minimal number of cases does not necessitate the assignment of lead and liaison counsel. Moreover, the two litigations involve separate issues relating to the proposed formulations, defenses, and counterclaims raised by Defendants. Apotex seeks approval of both a 0.1% and 0.15% brimonidine tartrate ophthalmic solution. Exela only seeks approval for a 0.15% solution. Apotex’s defenses and counterclaims focus mainly on invalidity and inequitable conduct, while Exela’s defenses and counterclaims focus on noninfringement and invalidity. These differences present difficulties in appointing a single lead counsel.

The differences in the preparation necessary for Apotex and Exela to prepare their individual cases for trial make it difficult to appoint a lead counsel to represent the interests of both Defendants. Indeed, it is likely that the action against Exela will not be before this Court

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<sup>1</sup> As an example, in the Rembrandt MDL (C.A. No. 07-md-1848) before this Court, there are numerous defendants, varied patents and claims at issue, and different products. There, defense counsel have made an application for lead and liaison counsel.

for trial but instead will be remanded back to the transferor court, the Central District of California. In view of this, the Defendants respectfully request that the Court not appoint lead and liaison counsel in this MDL proceeding.

**II. In the Alternative, Defendants Make the Following Application for Lead Counsel**

Although Defendants agree that the appointment of lead counsel is not necessary for the reasons provided above, if the Court finds it necessary, the Defendants make the following application.

Pursuant to the Court's Order and in line with Defendants' consultations, Defendants propose that lead counsel would primarily be responsible for coordinating the activities of the Defendants to promote the efficient advancement of this action and have the following responsibilities:

1. To determine and coordinate the positions of each of the Defendants on substantive and procedural issues and, where possible, attempt to reach consensus on such issues;
2. To identify, with input from all defense counsel, the tasks to be performed by the Defendants and the dates by which they must be performed;
3. To coordinate the completion of common tasks. Such coordination will be performed collaboratively with all defense counsel, considering: (i) judicial and party economies; (ii) the desires and potentially differing positions of the different defendants; and (iii) that the cases may be tried before different courts; such tasks include the preparation of internal work product, but also include propounding and responding to common discovery requests, taking and defending depositions, preparing briefs, and presenting oral arguments; and
4. To serve as a point of contact to Plaintiff's counsel on substantive and procedural issues.

It is proposed that lead counsel, as well as other defense counsel, will present positions to the Court on behalf of multiple Defendants, where appropriate and with consent of those

Defendants. Moreover, each Defendant, through its own counsel, reserves the right to present its own position regarding any substantive or procedural matters on which, notwithstanding the above-described attempts to reach a consensus, the Defendants do not reach a common position. Further, Defendants recognize that they may have unique defenses and therefore anticipate some degree of individual discovery and motion practice, notwithstanding their intention to coordinate to the extent practical.

Defendants request the following law firms be appointed to act as joint-lead counsel in this MDL proceeding:

<b>Joint-Lead Counsel</b>	<b>Parties Represented</b>
Welsh & Katz, Ltd. 120 S. Riverside Plaza 22 <sup>nd</sup> Floor Chicago, IL 60606 Tel.: (312) 655-1500 Fax: (312) 655-1501	Apotex, Inc.  Apotex Corp.
Frommer Lawrence & Haug LLP 745 Fifth Avenue New York, NY 10151 Tel.: (212) 588-0800 Fax: (212) 588-0500	Exela PharmSci, Inc.  Exela Pharm Sci Pvt., Ltd.  Paddock Laboratories, Inc.  PharmaForce, Inc.

Both Welsh & Katz, Ltd. and Frommer Lawrence & Haug LLP are willing and able to undertake the time-consuming responsibilities of joint-lead counsel and are committed to working cooperatively with the others. In addition, both firms have extensive experience as lead patent litigation counsel and have committed the resources to advance the litigation in a timely manner.

### **III. In the Alternative, Defendants Make the Following Application for Liaison Counsel**

Although Defendants agree that the appointment of liaison counsel is not necessary for the reasons provided above, if the Court finds it necessary the following application is made.

Pursuant to the Court's Order and in line with Defendants' consultations, Defendants propose that joint-liaison counsel for the Defendants have the following responsibilities:

1. To communicate with the Court and with Plaintiff's counsel on administrative, scheduling, and other matters of coordination;
2. To maintain and distribute to co-counsel and to Plaintiff's liaison counsel an up-to-date service list;
3. To receive and, as appropriate, distribute disputes that are common to multiple Defendants; and
4. To call meetings of co-counsel for the purpose of coordinating common discovery activities.

Defendants request the following law firms be appointed to act as joint-liaison counsel in this MDL proceeding:

<b>Joint-Liaison Counsel</b>	<b>Parties Represented</b>
Potter Anderson & Corroon LLP Hercules Plaza 6th Floor 1313 N. Market Street P.O. Box 951 Wilmington, DE 19801 Tel. (302) 984-6000	Apotex, Inc.  Apotex Corp.
Richards, Layton & Finger One Rodney Square 920 North King Street P.O. Box 551 Wilmington, DE 19899 Tel. (302) 651-7700 Fax (302) 651-7701	Exela PharmSci, Inc.  Exela Pharm Sci Pvt., Ltd.  Paddock Laboratories, Inc.  PharmaForce, Inc.

Potter Anderson & Corroon LLP and Richards, Layton & Finger, P.A. are willing and able to undertake the time-consuming responsibilities of joint-liaison counsel, and are committed to working cooperatively with each other. In addition, both firms frequently assume and successfully perform the responsibilities associated with liaison counsel identified above, and have committed the resources to advance the litigation in a timely manner.

Furthermore, both Potter Anderson & Corroon LLP and Richards, Layton & Finger, P.A. are committed to working together to make the proceedings manageable for the Court. The firms will work together to streamline presentations to the Court where practical and submit joint proposals and requests to the Court where Defendants' interests overlap.

#### **IV. Conclusion**

For the foregoing reasons, the Defendants respectfully request that the Court forego the appointment of lead and liaison counsel or, in the alternative, request that the Court appoint as lead and liaison counsel the aforementioned firms, whom Defendants unanimously wish to serve in those roles.

RICHARDS, LAYTON & FINGER, P.A.

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Dated: November 30, 2007

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**CERTIFICATE OF SERVICE**

I, Kenneth L. Dorsney, hereby certify that on November 30, 2007, the attached document was electronically filed with the Clerk of the Court using CM/ECF which will send notification to the registered attorney(s) of record that the document has been filed and is available for viewing and downloading.

I further certify that on November 30, 2007, I have Electronically Mailed the document to the following person(s):

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